Mukhtar bin Abdul Rahman v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL REVIEW NO 43–08 OF 2007
ZAMANI A RAHIM JC
23 APRIL 2008

Civil Procedure — Judge — Application to recuse judge — Real danger of bias test — Whether there was likelihood of bias

This was an application to revise the decision of the magistrate dismissing the appellant's application to recuse herself from further hearing and making decision on the appellant's case and to have the said case heard de novo. The grounds for the application was, inter alia, that the magistrate who had part heard the prosecution's case, conducted by BPR, had 'ceased to have the jurisdiction' after she was transferred to the BPR School of Law and assumed the functions of DPP, and that the accused was 'materially prejudiced' as there was possibility that the magistrate may favour the prosecution and as such, there was likelihood of bias against the accused.

Held, dismissing the application:

Based on the facts, its effect and circumstances, the court found that there was no possibility of bias. This was greatly influenced by the fact that the magistrate had openly declared and informed the prosecution and the appellant of her position with the BPR, which was not met with any objections from the appellant's counsel. Viewed objectively and applying the real danger of bias test to the facts and circumstances of the case, there was no possibility of such bias by the magistrate.

[Bahasa Malaysia summary

Ini adalah permohonan untuk menyemak semula keputusan majistret yang menolak permohonan perayu untuk menarik dirinya daripada terus mendengar dan membuat keputusan ke atas kes perayu dan mendapatkan kes tersebut didengar secara de novo. Alasan perayu adalah, antara lain, bahawa majistret yang telah mendengar sebahagian kes pendakwaan, yang dijalankan oleh BPR, telah 'berhenti daripada mempunyai bidang kuasa' selepas beliau dipindahkan ke Sekolah Perundangan BPR dan memikul fungsi TPR, dan oleh itu tertuduh adalah 'secara material diprejudiskan' kerana terdapat

kemungkinan yang majistret mungkin berpihak kepada pendakwaan dan oleh itu, besar kemungkinan berat sebelah terhadap tertuduh. A

Diputuskan, menolak permohonan: B

Berdasarkan fakta, kesan dan keadaannya, mahkamah mendapati bahawa tidak mungkin terdapat berat sebelah. Ini dipengaruhi oleh fakta bahawa majistret telah secara terbuka mengisytiharkan dan memberitahu pendakwa dan perayu berkenaan dengan kedudukannya dengan BPR, yang mana tidak mendapat apa-apa bantahan daripada peguam perayu tersebut. Menyemak C secara objektif dan menggunapakai ujian bahaya berat sebelah sebenar kepada fakta dan keadaan kes ini, tidak mungkin terdapat berat sebelah tersebut oleh majistret.]

Notes D

For a case on application to recuse judge, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3748–3747.

Cases referred to

Abdul Hamid bin Udin v PP [2000] 6 MLJ 334, HC (refd) E
Cheak Yoke Thong v PP [1984] 2 MLJ 119; [1984] 1 CLJ 87, FC (refd)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 577, FC (refd)
Hj Ibrahim bin Wahab & satu yang lain lwn Peguam Negara & lain-lain [1995] 1 MLJ 493, HC (refd) F
Kiew Foo Mui & Ors v PP [1995] 3 MLJ 505, SC (not folld)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)
Metropolitan Properties Co (FGC) Ltd v Lannon & Ors [1969] 1 QB 577, CA G (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321; [2001] 4 CLJ 701, FC (refd)
Mohd Amin bin Abdullah lwn Pendakwa Raya [1995] 1 MLJ 612, HC (refd)
Oh Keng Seng v PP [1976] 1 MLJ 143, HC (refd) H
PP v Goh Chooi Guan [1978] 2 MLJ 169, HC (refd)
PP v Kulasingam [1974] 2 MLJ 26, HC (refd)
R v Camborne Justices, ex p Pearce [1955] 1 QB 41, QB (refd)
R v Gough [1993] AC 646, HL (refd)

I

Legislation referred to

Criminal Procedure Code ss 261, 323, 326
Penal Code ss 182, 392, 393

Hussaini bin Abdul Rashid (Kumar & Co) for the petitioner.
Siti Maslia bt Ibrahim (Deputy Public Prosecutor, Alor Star Legal Adviser's Office) for the respondent.

Zamani A Rahim JC:

INTRODUCTION

[1] This is an application to revise the decision of the magistrate at Langkawi Court given on 10 October 2007 dismissing the petitioner's application to recuse herself from further hearing and making decision on the petitioner's case and to have the petitioner's case heard de novo. I have called for the records from Langkawi Magistrates' Court.

[2] The petitioner is hereinafter referred to as 'the accused'; the term *Badan Pencegah Rasuah* is abbreviated 'BPR'; and the term deputy public prosecutor is abbreviated 'DPP'.

FACTUAL BACKGROUND

[3] The trial of the accused proceeded as hereinafter mentioned. It is a criminal proceedings.

On 10 June 2003, the accused a public officer, was charged at Langkawi Magistrates' Court with one count of charge under s 182 of the Penal Code ('PC') at the instance of BPR. This is a BPR's case. The accused was represented by counsel. The charge read as follows:

> Bahawa kamu pada 2.1.2000 jam 2.30 petang di Pejabat Badan Pencegah Rasuah Langkawi, Tingkat 5, Kompleks LADA, Persiaran Putra, dalam Daerah Langkawi, dalam Negeri Kedah telah memberitahu Penolong Penguasa BPR Mohd. Adnan bin Hj. Mustafa, seorang penjawat awam iaitu pegawai Badan Pencegah Rasuah melalui maklumat bertulis iaitu BPR Langkawi Aduan No 01/2000 menyatakan 'Pengadu berkata: Pada 30.12.1999 Yap Chee Seng datang menemui saya di pejabat berhubung dengan kaveat tanahnya di GM967 dan 966 Mk Kuah, Langkawi kerana tidak menjelaskan hutangnya tertunggak RM340.925.00 berhubung dengan bayaran royalty kuari tanah merah di kawasan Kenyum Lot 2210 Mk. Ulu Melak, Langkawi dan ia menawarkan wang Rasuah RM30,000.00 berbentuk post dated cek dan RM5,000.00 cara tunai kepada saya bagi menyelesaikan kes ini. Yap Chee Seng akan bayar kepada saya hari Isnin 3.1.2000 di pejabat saya', yang kamu ketahui sebagai palsu dengan niat bahawa perlakuan sedemikian itu adalah berkemungkinan akan menyebabkan penjawat awam tersebut melakukan tindakan ke atas Yap Chee Seng, yang penjawat awam tersebut tidak lakukan sekiranya kedudukan sebenar fakta berkenaan maklumat sedemikian diketahui olehnya, dengan itu kamu telah melakukan kesalahan di bawah Seksyen 182 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

[4] On 18 August 2003, the trial started. It was before Puan Norina bt Zainol Abidin, a magistrate at Langkawi Magistrates' Court. Three years had passed, she had heard eight prosecution witnesses, that is, SP1 to SP8 and two witnesses in an impeachment proceedings. The prosecution was yet to close its case.

[5] On 1 June 2006, Puan Norina was transferred as the magistrate at Kangar Magistrates' Court. Vide a letter dated 20 June 2006, the accused counsel wrote to the Chief Registrar, Federal Court, Palace of Justice requesting that Puan Norina, who had gone on transfer to Kangar Magistrates' Court, to continue to hear the accused case. In the letter, counsel narrated the progress of the trial into the case in some details and had given no less than 10 reasons for his request. The said letter is reproduced below in extenso:

Date: 20.6.2006

Ketua Pendaftar Malaysia

Mahkamah Persekutuan dan Rayuan Malaysia

Palace of Justice

Presint 3, Pusat Pentadbiran Kerajaan Persekutuan

62506 Putrajaya

Kuala Lumpur

Yang Arif,

PER: MAHKAMAH MAGISTRET LANGKAWI

KES TANGKAP NO 82–01–2003

PENDAKWARAYA LWN MUKHTAR BIN ABDUL RAHMAN

PERTUDUHAN DI BAWAH SEKSYEN 182 KANUN KESEKSAAN

Dengan segala hormat dan izin, pihak kami ingin merujuk Yang Amat Arif kepada perkara di atas di mana kami mewakili tertuduh; Encik Mukhtar bin Abdul Rahman.

Kes ini telah ditetapkan untuk Sambung Bicara pada 19.6.2006 dan sekarang telah ditetapkan untuk *Sebutan* pada *10.7.2006.*

Tujuan kami menulis surat kepada Yang Arif adalah berkenaan pertuduhan seperti di atas dan juga tentang perkembangan yang baru yang telah timbul terhadap kes ini seperti dihuraikan di bawah ini.

Perbicaraan kes di atas telah berlanjutan selama *11 hari* di mana ia telah bermula perbicaraan pada 21.10.2003 dan tarikh-tarikh sambung bicaranya adalah seperti berikut:

- 18.9.2005, 19.9.2005 dan 20.9.2005

- 8.10.2005
- 27.12.2005 dan 28.12.2005
- 23.1.2006
- 6.3.2006
- 24.4.2006
- 26.4.2006

Kes di atas telah ditetapkan untuk Sambung Bicara juga pada 19.6.2005 dan 20.6.2005. Namun begitu pada 19.6.2006, pihak kami telah dimaklumkan bahawa Magistret yang mendengar kes ini; Puan Majistret Norina bt Zainol Abidin telah dipindahkan ke Mahkamah Majistret Kangar, Perlis.

PIHAK KAMI KINI MENULIS KEPADA YANG AMAT ARIF DENGAN TUJUAN MEMBUAT PERMOHONAN DENGAN RENDAH DIRI SUPAYA PUAN MAJISTRET NORINA BT ZAINOL ABIDIN DIBENARKAN UNTUK TERUS MENDENGAR KESELURUHAN KES INI SEHINGGA AKHIRNYA ATAS ALASAN-ALASAN BERIKUT;

1. Perbicaraan kes di atas telah berlangsung selama 11 hari.
2. Tertuduh dalam kes ini adalah seorang pegawai kerajaan dan buat masa sekarang digantung pekerjaannya sehingga selesai Pendengaran kes di atas.
3. Dengan menyambung semula perbicaraan, Mahkamah yang Mulia akan menjimatkan masa dan kos.
4. Sembilan [9] orang saksi telah memberi keterangan di Mahkamah dalam masa 11 hari Perbicaraan berjalan.
5. Saksi ke-tujuh Pendakwaan merupakan Pengadu di dalam kes ini dan keterangan beliau telah mengambil masa selama lebih kurang 5 hari Perbicaraan. Keterangan oleh Beliau adalah panjang.
6. Saksi ke-lima pihak Pendakwaan adalah Penolong Pentadbir Tanah dan keterangan yang telah diberikan olehnya adalah terperinci, teknikal dan panjang lebar berkenaan prosedur-prosedur pengusaha kuari membuat permohonan ke Pejabat Tanah sehingga Penamatan tender mengkuari tanah. Beliau juga memberi keterangan prosedur yang akan diambil sekiranya terdapat kemungkiran dalam kerja-kerja mengkuari oleh seorang Pengkuari Tanah.
7. *Suatu Permohonan Mencabar Keboleh Percayaan [Impeachment Proceedings] Keterangan Saksi ke-lima pihak Pendakwaan telah berjalan di mana Pendaftar Mahkamah Sesyen Alor Setar sendiri telah menjadi saksi bagi Permohonan Mencabar Keboleh Percayaan [Impeachment Proceedings] Keterangan saksi ke lima pihak*

Pendakwaan. Walaupun Permohonan ini telah tamat namun begitu keputusan permohonan ini masih belum boleh dibuat oleh Majistret sehingga akhir kes Pendakwaraya dan hanya akan boleh dibuat oleh Majistret yang telah mendengar Permohonan tersebut.

8. Semasa Perbicaraannya dijalankan, Puan Majistret telah melihat sendiri tingkah laku dan kredibiliti saksi-saksi semasa Perbicaraan. Fakta-fakta ini adalah amat penting dan jikalau seseorang Majistret baru mengambil alih Perbicaraan sekarang, sebarang tingkahlaku demeanour dan kredibiliti saksi terutama sekali saksi ke-lima pihak Pendakwaan [di mana Permohonan Mencabar Keboleh Percayaannya telah dilakukan] tidak akan ada dalam pengetahuan Majistret baru. Sekiranya Majistret baru mengambil alih pendengaran kes ini, beliau tidak akan memahami dan mengikuti sepenuhnya Keterangan-keterangan yang telah diberi dan akan diberikan.

9. Pihak Pendakwaan hanya mempunyai lebih *kurang tiga [3] orang saksi* formal lagi sebelum menutup kes bagi Pendakwaan.

10. Sekiranya kes ini dijalankan di hadapan Majistret yang baru, terpaksa 'De Novo' di mana banyak masa akan terbazir dan dibuang.

Pihak kami dengan rendah diri memohon kepada Yang Amat Arif atas budi bicara Yang Amat Arif untuk membolehkan Puan Majistret terdahulu mendengar sambung bicara kes ini di Langkawi hanya untuk keterangan lebih kurang tiga [3] orang lagi saksi pihak Pendakwaan, Hujahan dan juga Keputusan kes di atas untuk kepentingan keadilan.

Pihak kami dengan rendah diri juga memohon kepada Yang Amat Arif atas budi bicara Yang Amat Arif untuk membolehkan kes ini diteruskan di dengar di Mahkamah Majistret Langkawi untuk menjimatkan masa pihak-pihak dan saksi-saksi terlibat untuk kemudahan kesemua pihak dan keadilan.

Segala kesulitan yang ditimbulkan di sini adalah teramat dikesali.

Sekian, terima kasih.

Yang benar,

t.t.

TETUAN KUMAR & CO.

PEGUAMBELA & PEGUAMCARA

[6] The chief registrar, by her letter dated 5 July 2006 replied to counsel that Puan Norina was allowed to continue hearing the case to full completion. The said letter in Bahasa Malaysia reads, inter alia, 'Puan Norina bt Zainol Abidin bolehlah meneruskan perbicaraan bagi kes di atas sehingga penyelesaian penuh'.

[7] Puan Norina continued to hear another four prosecution witnesses, that is, P9 to SP12. The prosecution closed its case on 6 February 2007, having called 12 witnesses and produced 21 exhibits. The case was fixed for decision on 23 May 2007. In the meantime, the parties were instructed to file their respective written submissions.

[8] On 26 February 2007, the defence had filed its written submission, followed by the prosecution on 19 March 2007 and the reply by the defence on 9 April 2007.

[9] On 23 May 2007, Puan Norina had notified her decision to the Langkawi Magistrates' Court. Her decision at the close of prosecution case was read by Ahzal Fariz bin Ahmad Khairuddin, the succeeding magistrate at Langkawi. The decision was that a prima facie case against the accused had been made out and called for his defence. Puan Norina too decided in the impeachment proceedings that the credibility of one of the prosecution witnesses namely, SP7 was saved and remained unimpeached as there were no material contradictions in his evidence. The case was fixed on 25 July 2007 and 26 July 2007 for continued hearing of the defence case. For no apparent reason the case was adjourned to 13 August 2007.

[10] Before the defence case could begin, Puan Norina was again transferred from Kangar Magistrates' Court to BPR School of Law, at Putrajaya as DPP. Vide a letter dated 12 July 2007 from the chief registrar, Puan Norina was directed to continue hearing the case.

[11] On the continued hearing date, that is, 13 August 2007, before hearing the defence case, Puan Norina had brought to the attention of both the defence and the prosecution of her latest career position, that is, she was serving as BPR DPP whose duties, among others, was to act as a prosecutor in court involving BPR cases. Despite this disclosure, both the defence and prosecution had no objection thereto. This was because the parties recognised that this case was long outstanding and needed to complete promptly without further adjournment. Puan Norina then proceeded to hear the defence case for two consecutive days namely, on 13 August 2007 and 14 August 2007. The accused evidence was still incompleted. The case was put to 10 September 2007 for further continuation of the accused evidence.

[12] On 10 September 2007, the accused continued his defence and upon completion, the defence closed its case. No other witnesses. Only the accused gave evidence on oath. The case was then adjourned for the defence and prosecution to file their respective written submissions. The case was finally fixed on 5 November 2007 for decision.

[13] In the meantime, on 1 October 2007, Puan Norina was transferred from BPR School of Law, at Putrajaya to hold the office of DPP at Unit Pendakwaan, Pejabat Penasihat Undang-Undang Negeri, Pulau Pinang.

[14] On 5 November 2007, the date due for decision, Puan Norina unexpectedly met with a written and oral application from the accused counsel. Firstly, she was to recuse herself from further hearing the case and to deliver her decision. Secondly, to have the case be heard de novo before another magistrate. Having heard counsel's submission and also the contention of the prosecution which, of course, opposed the application, she dismissed the recusal application. Thereafter, the case was again fixed for decision at the end of the whole trial on 7 January 2008. Counsel had applied for adjournment to enable him to file the case for revision under s 323 of the Criminal Procedure Code ('CPC') at Alor Star High Court. This application for postponement was also dismissed by Puan Norina. The defence and prosecution were directed to file their written submissions respectively.

[15] The trial into this case was by no mean smooth sailing. The trial was punctuated with several postponements, at the request of both the prosecution and defence, for various reasons. Finally, the case was a whisker away from final verdict at the end of the defence case, but for this recusal application. This case has dragged on for almost 4½ years and it is yet to be completed. I was made to understand that, in Langkawi Magistrates' Court, this was the only criminal case for the year 2003, which was yet to be disposed off. Otherwise the Langkawi Magistrates' Court records for outstanding cases for the year 2003 were nil. Bear in mind that the accused was a government servant whose criminal trial has attracted the Practice Direction No 1 of 1994. The case involving government staff must be fixed for hearing from day to day and disposed off promptly. Though the said practice direction has no binding force, nonetheless adherence thereto is necessary for a better and efficient system of administration of criminal justice in this country.

RECUSAL APPLICATION BEFORE THIS COURT

[16] Dissatisfied with Puan Norina's decision, counsel had filed a petition vide Semakan Jenayah No 43–08 of 2007 to revise Puan Norina's dismissal of the recusal application and to have the case be heard de novo. The case was heard before me on 11 December 2007. By virtue of s 326 of the CPC, I have given permission to the defence and the prosecution to address the court on this matter. Before me, the defence essentially repeated his submission before the magistrate, Puan Norina.

[17] This application was made under s 261 of the CPC. The section reads:

> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who excercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may resummon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of the opinion that the accused has been *materially prejudiced* thereby, and may order a new trial.

[18] As I understand it, the grounds of this recusal application may be summarised as follows:

(1) Puan Norina who had part heard the prosecution case, which case was conducted by the BPR had *'ceased to have jurisdiction'* after she was transferred to the BPR School of Law and assumed the functions of DPP.

(2) The accused was *'materially prejudiced'* because having assumed the functions of DPP at the BPR School of Law, there was a possibility that Puan Norina may had favour the prosecution and at such, there was a likelihood of bias against the accused.

COUNSEL SUBMISSION

[19] To support his submission counsel cited five local authorities and two English authorities. In *Oh Keng Seng v Public Prosecutor* [1976] 1 MLJ 143, a sessions court judge who heard the case was transferred to become the DPP. He had heard 12 prosecution witnesses. An application was filed at the High Court to recuse him to hear the case and the case to be heard de novo. Ajaib Singh J was of the view that the sessions court judge having been transferred to assume the functions of the DPP at whose instance the accused was charged, the learned sessions judge 'ceased to have jurisdiction' to continue the partheard case. His Lordship opined at p 144 as follows:

In my opinion Encik Abdul Khalid ceased to exercise any jurisdiction in the trial of the applicant upon his appointment as a deputy prosecutor no matter where he was transferred to this post. It is true that his earlier appointment as a president of the sessions court has not been de-gazetted but that cannot be the sole criterion in deciding whether or not Encik Abdul Khalid has ceased to exercise jurisdiction in the part-heard case. There are other important factors which must be taken into account. These are that Encik Abdul Khalid is now performing entirely different functions as a deputy public prosecutor and that he has vacated his previous post as president of the sessions court in Seremban to another officer who has now assumed jurisdiction over all matters pending in that court. As a result Encik Abdul Khalid has in my judgment ceased to exercise the powers of a president of the sessions court and he is not competent to continue with the hearing of the part-heard case.

[20] However, Syed Agil Barakbah J in *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 169 decided that any magistrate or judge who was transferred to a different place or district, he or she could continue to hear the part heard case. However, when he or she became the DPP, there was, therefore, a likelihood of bias and the accused may prejudiced in the eyes of the public. His Lordship said at p 170 as follows:

In the case of transfer to the post of senior federal counsel or deputy public prosecutor, I do not consider the president or magistrate ceases to have jurisdiction, being still gazetted as such. He only ceases to officiate as a President or magistrate. There appears to be no legal objection under any written law for him to continue the part-heard case. Nevertheless, a different question as regards public interest has to be considered in relation to the overriding principle that justice must not only be done but must manifestly and undoubtedly be seen to be done. A man is disqualified from sitting in a judicial capacity on ground of bias in favour of one side of the other, or of prejudice against one side or of contravention of the rules of natural justice. There need not be actual bias or prejudice, but it is sufficient if in the eyes of right-minded persons there is such likelihood, in the circumstances, even though he is impartial as can be. It is not the mind of the president or the magistrate that has to be looked into and whether he favours one side at the expense of the other, but rather the impression which would be given to the public at large (per Lord Denning MR in *Metropolitan Properties Co Ltd v Lannon* [1969] 1 QB 577, at p 599). In the case of a deputy public prosecutor, whose duties are opposed to those of a president or a magistrate and who has direct access to investigation papers of criminal cases, it is undesirable in the circumstances for him to sit on the bench and to continue the trial part-heard by him. The succeeding president or magistrate will have to exercise his powers by invoking s 261.

[21] In *Hj Ibrahim bin Wahab & satu lagi lwn Peguam Negara & lain-lain* [1995] 1 MLJ 493, the sessions court judge who heard the case was appointed as the DPP. He continued to hear the part heard case in his capacity as the sessions court judge and at the end of the defence case, he amended the charge under a different section of the law and convicted all the

accused persons. Syed Ahmad Idid J decided that the case to be heard de novo before another judge. His Lordship said at p 496 is:

> Terlebih dahulu, saya ingin mengatakan bahawa saya faham adakalanya perkhidmatan kehakiman dan perundangan memerlukan pertukaran pegawai dengan serta-merta, tetapi bagaimanapun, saya mestilah memutuskan di antara perkhidmatan dan undang-undang, undang-undang mestilah diutamakan dan mengatasi Iain-lain kepentingan. Betapa baiknya jika hakim tersebut dikekalkan sehingga perbicaraan itu berakhir dengan adanya satu keputusan tetapi apa boleh buat bagai buah keras di dalam sekul: *Maleb bin Su v PP*; *Cheak Yoke Thong v PP* [1984] 1 MLJ 311. Lihat juga *Magistrates' Court Handbook* [1994] MLJ) di ms 4 dan 5.

[22] In another judgment of Syed Ahmad Idid J in *Mohd Amin bin Abdullah lwn Pendakwa Raya* [1995] 1 MLJ 612, the facts are these. The magistrate who heard the case was transferred to become DPP. He had heard 100 witnesses for the prosecution who had given evidence. There were 145 exhibits had been marked and tendered. The accused was held under remand throughout the trial. Having regard to the large number of witnesses and evidence adduced and further that the accused was under remand, His Lordship had suggested that the former presiding magistrate to be transferred back as magistrate for a certain length of time to complete the part heard case. His Lordship's decision, among others:

> (2) Fungsi kedua-dua jabatan kehakiman dan perundangan semestinya benar-benar berbeza. Apabila terdapat pertukaran pegawai-pegawai di antara kedua-dua jabatan itu, mahkamah berpendapat bahawa seseorang pegawai itu tidak boleh melaksanakan kedua-dua fungsi serentak.
>
> (3) Tidak perlu terdapat tindakan berat sebelah atau prasangka yang jelas sebelum seseorang itu dilucuthak daripada bersidang di dalam kedudukan kehakiman. Adalah mencukupi jika pada pandangan orang-orang yang berfikiran wajar terdapat kemungkinan besar tindakan berat sebelah atau prasangka dilakukan.
>
> (4) Memandangkan hujah responden, mahkamah mencadangkan supaya Puan Fadzillah ditukar balik dengan segera ke Jabatan Kehakiman sebagai majistret untuk meneruskan dan menyelesaikan perbicaraan kes-kes itu. Jika pertukaran balik itu tidak dapat diselenggarakan dalam masa dua minggu, dengan sendirinya mahkamah meluluskan permohonan ini untuk perbicaraan de novo. Jika sebaliknya, dengan sendirinya permohonan ini ditolak.

[23] The accused counsel went on to submit that even though all the witnesses had given evidence, s 261 of the CPC may still be utilised to allow the case to be heard de novo. In *Abdul Hamid bin Udin v Public Prosecutor* [2000] 6 MLJ 334, Abdul Wahab J said (at pp 343–344):

> To my mind, while transfers of judicial officers in the midst of an ongoing trial is undesirable, the alternative of not transferring is at least equally undesirable. This alternative in practice occurs because large numbers of trial cases are part heard and adjourned for various reasons, and it is difficult to find an instance of an officer who does not have part heard cases unless he had just been transferred into that office. The cost and disturbance to hearings of cases if officers have to return to their earlier posts to finish hearing of part heard cases would be even more undesirable. Accepting therefore the fact transfers are a necessary evil, we must return to the application of s 261 as it is intended. In this I note specifically the use of the words 'after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein'. The legislature clearly intended the section to apply even in a case where the whole of the evidence has been heard by the preceding judge. More importantly are the words *'ceases to exercise jurisdiction therein'*. The moment a judge is transferred out of a court, he ceases to exercise jurisdiction in all of the cases in court he is transferred from and assumes jurisdiction in the court he is transferred to. That he remains a judge, and contrary to fiction, has nothing to do with the issue since cases are not assigned to judges personally, but to the courts.

[24] Defence counsel also relied on the English authority of *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41 to advance 'the real likelihood of bias test'. Slade J who delivered the judgment at pp 47–48 said:

> ... the authorities as a whole are almost overwhelming in support of the requirement that, to use the well-known words of Blackburn J in *R v Rand* (1866) LR 1 QB 230 at p 232, *'a real likelihood'* of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part or assisted in adjudicating upon them was in law incapacitated by interest from doing so.

His Lordship concluded by saying at p 51:

> In the judgment of this court the right test is that prescribed by Blackburn J, namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, *a real likelihood of bias* must be shown.

[25] In another illuminating judgment in the English Court of Appeal case of *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1969] 1 QB 577, Lord Denning MR explained the real likelihood of bias test in following words:

> ... in considering whether there was *a real likelihood of bias*, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the *impression* which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a *real likelihood of bias* on his part, then he should not sit. And if he does sit, his decision cannot stand; see *R v Huggins* [1895] 1 QB 563; and *R v Sunderland Justices* [1901] 2 KB 357 (CA), per Vaughan Williams LJ (at p 373). Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41 at pp 48–51; [1954] 2 All ER 850, and *R v Nailsworth Licensing Justices, ex p Bird* [1953] 2 All ER 652; [1953] 1 WLR 1046. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: *The judge was biased.*

[26] Learned counsel summed up his submission by saying that: (a) upon being transferned to the BPR School of Law as its DPP, Puan Norina had *ceased to have jurisdiction* to hear the accused part heard case; (b) the accused was *materially prejudiced* because of Puan Norina's two roles as the BPR DPP and the magistrate having regard the case against the accused was instituted and prosecuted by the BPR. Counsel prayed that this court made an order to recuse Puan Norina from continuing and delivering her judgment in this case and further order that the case be heard de novo before another magistrate.

PROSECUTION CONTENTION

[27] The learned deputy opposed this application. He cited the case of *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 to support his contention. The facts are these. The accused was charged in the Seremban Sessions Court under s 409 of the PC. The prosecution case commenced on 15 June 1971. In this protracted trial, the prosecution had called 27 witnesses and tendered 98 exhibits. The prosecution closed its case and defence was called on 20 September 1972. On 20 January 1973 the three alternatives were explained to the accused. He gave evidence. From then on, no progress was made on the trial, except that several postponements were granted namely, on 19 April 1973 whereby Encik Abdul Murad was directed not to hear the case as he was appointed as a DPP. Secondly, on 21 September 1973 the new president of the sessions court, Encik Mohamad Noor bin Haji Abdullah made an order for the case to be tried de novo. On 29 January 1974, the case was mention again before Encik Wan Abdul Aziz bin Wan Daud, at this stage

the DPP suggested that the case to be continued under s 261 of the CPC. The defence objected and wished that the order of de novo by the previous president to remain. Again on 14 March 1974 the case came up before the original president, Encik Abdul Murad and defence counsel contended that as the case was already ordered to be heard de novo, the case could not be continued under s 261 of the CPC. Subsequently, defence counsel applied for an order of prohibition against Encik Abdul Murad prohibiting him from further proceeding the case. The matter came to the High Court on revision.

[28] On those facts the High Court ordered that the case to be continued under the provisions of s 261 of the CPC. This was in view of a large number of witnesses had already given evidence and also a large number of exhibits had already been tendered.

[29] As regard the transfer of the president (currently known as sessions court judge) or magistrate to assume the functions as federal counsel or DPP of the legal department, Hashim Yeop A Sani J had this to say at p 26 right column E–G:

> My view has always been that it would be perfectly proper for a president or magistrate who has since been transferred to the legal department to assume functions as federal counsel or deputy public prosecutor to complete any part-heard cases originally heard by him in the court where he was previously stationed. But of course this must be subject to an overriding condition that there must not be any possible miscarriage of justice or any contravention of rules of natural justice as for example in a case where the officer concerned was previously a President or magistrate in the same state but has now been appointed to be a deputy public prosecutor in the same state. The mere fact that by virtue of his office he has access to investigation papers relating to the case should disqualify him from hearing the case.

[30] In the Federal Court case of *Cheak Yoke Thong v Public Prosecutor* [1984] 2 MLJ 119; [1984] 1 CLJ 87, the accused was charged with an offence of attempted robbery with deadly weapon under s 393 and s 392 of the PC together with a co-accused, Wong Kim Seong. Leave was obtained to refer a number of questions for the Federal Court's determination. At the suggestion of the Federal Court, the several questions were reframed into a single question as follows:

> Whether the fear on the applicant's part that the learned magistrate being a member of the judicial and legal service of which the Attorney-General is the highest ranking officer, having control of the learned magistrate's career in the said service was reasonable to hold that there could be bias or there was reasonable suspicion of bias whereby it was reasonable to say that in those circumstances justice may not seem to be done.

Salleh Abas LP said at p 121 (MLJ); p 89 (CLJ) as follows:

> From the above question, two issues are raised. Firstly, whether Cheak's fear of the possibility of the magistrate being biased, whether the fear be justified or not, is a sufficient reason for the magistrate to disqualify himself from hearing the case. Secondly, whether the assumption upon which the question is framed in that the Attorney-General is 'having control of the learned magistrate's service' is factually or legally correct. As to the first issue, surely no one could come to Court and seek for the dismissal of the case against him or for a trial by another tribunal just because he said that the adjudicating officer would be biased against him. On this ground alone the application should be turned down. His fear alone is not sufficient. He must, however, show by evidence that the adjudicating officer or the tribunal is in fact biased or is likely to be so. Hashim Yeop ASani FJ has examined this question and we see no reason to differ from his view. As to the second issues, this too was dealt with by the learned judge and we agree with him that the assumption is erroneous both in fact and in law.

His Lordship went on to say in the next paragraph:

> But the court will not disqualify him merely because of his words, deeds or his association with a party who is instituting or defending the proceedings before him unless the circumstances of the case show that there is a real likelihood or reasonable suspicion of bias (*de Smith's* (4th Ed), at p 251).

[31] The learned DPP contended that Puan Norina did not appear to have any bias or appearance of bias against the accused on the grounds that:

(a) the scope and functions of DPP for BPR at the School of Law at Putrajaya may be distinguished from the other BPR DPPs (the non-School of Law DPPs);

(b) the DPPs at the School of Law at Putrajaya do not have access to the BPR investigations papers including the investigation papers on the accused in this case; and

(c) no reason for Puan Norina to be under the influence of the Attorney General as he is not the head of the judicial and legal service, though Puan Norina is one of the junior members of the service. Puan Norina is accountable to the director of BPR.

[32] Based on the above argument, the prosecution requested the court to dismiss the recusal application and to allow Puan Norina to complete the case by hearing the submission of the defence and the prosecution at the close of the defence case and to deliver judgment thereto.

THE LAW

[33] Before I deal with the present case, let us examine the decision of the House of Lords in the case of *R v Gough* [1993] AC 646 on the question of bias. The brief facts are these. In this case as in other criminal cases, the service of jurymen were employed. The appellant, Gough was tried on an indictment of conspiracy with his brother, David Stephen Gough to rob a betting shop. At the committal proceedings, the case against the appellant's brother ie, David Stephen Gough was dropped on the ground of insufficiency of evidence against him. At the end of the appellant's trial, he was convicted and sentenced to 15 years imprisonment. After the sentence was passed, the appellant's brother ie, David Stephen Gough who was present in court, had created a scene. He started to shout and protested. At this point of time, one of the jurors, Mrs Smith realised and recognised the appellant's brother was her neighbour. The appellant appealed against his conviction on the basis that the presence of Mrs Smith on the jury, there was such a possibility of bias on her part against the appellant. The appellant prayed that the conviction should be quashed. Subsequently, Mrs Smith swore an affidavit and the effect of the affidavit evidence may be catalogued as follows (see p 658):

(1) when she was a juror, she did not recognise the name 'Gough' as she knew her neighbour as 'Steve'. And she knew David's wife as Elaine during the two years that they had been her next door neighbour;

(2) the name of David Gough was mentioned several times in the course of the trial;

(3) she could not remember seeing the appellant before the trial and she had no idea that the appellant was the brother of her next door neighbour;

(4) during the trial, the prosecution counsel read out a statement which contained the address — 3, Buckley Way. Mrs Smith lives at No 2. She wondered whether 'Steve' was 'David Gough' but thought it could not be him as he was called Steve. She was confused;

(5) the photographs of the appellant and David Gough respectively were shown to the jury during the trial of the appellant. The police photograph colloquially known as 'mug shots' Mrs Smith did not recognise David; and

(6) the fact that David Gough was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury.

The affidavit evidence of Mrs Smith was unchallenged.

[34] Before *Gough* was decided by the House of Lords, there were two lines of authority on the question of bias or appearance of bias in criminal proceedings. Different test of bias is applied, firstly, to justices and other inferior tribunals and secondly, the jurymen. The jury system in criminal trial in our country has long been abolished. The two tests are a reasonable suspicion of bias test and a real likelihood of bias test. The real likelihood of bias test is referred to, in some cases, as the real danger of bias test. Sometimes these two tests are combined and interwovened with each other. It is confusing to say the least. In his book entitled *Judging the Judge* published in 2007, our former Court of Appeal judge, NH Chan sought the dictionary meaning of the phrases *real danger*, *real possibility* and *real likelihood* to see the difference. At pp 30 and 31, our former Court of Appeal judge proceeded as follows:

> In the phrase *real danger*, according to the *Oxford English Dictionary*: *danger* means *possibility of* and *possibility* means *a thing that is possible*; which means *capable of happening*;
>
> In the phrase *real possibility*, according to the *Oxford English Dictionary*: *possibility* means *a thing that is possible* which means *capable of happening*;
>
> And in the other phrase *real likelihood*, according to the *Oxford English Dictionary*: *likelihood* means *probability* and that means *an event that is likely to happen*.
>
> Therefore, could there be any real difference between the phrases? The phrases *real danger* (which is the choice of the Federal Court and binding on all other courts) means *capable of happening*, *real possibility* (as used by the House of Lords in *Porter v Magill*) also means *capable of happening* and *real likelihood* (which was used by the Court of Appeal, Lord Denning and myself) means *likely to happen*. Therefore, *real danger of bias* means *capable of being biased*, *real possibility of bias* also means *capable of being biased* and *real likelihood of bias* means *likely to be biased*. I am unable to see any difference between them, can you?

Perhaps, it is a distinction without difference.

Be that as it may, Lord Goff undertook an extensive and critical examination of numerous authorities included the case of *Metropolitan Properties Co (FGC)* and *R v Camborne Justices, ex p Pearce* which were relied upon by the accused counsel on the question of the real likelihood of bias. His Lordship concluded that same test should be applicable in all cases of apparent bias involving justices or members of other inferior tribunal or jurors or arbitrators. They were subjected to the same test. His Lordship judgment is reproduced below in extenso:

> In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course

of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him;...

[35] In his judgment, Lord Goff applied the real danger of bias test, which His Lordship said was the correct test, to the facts and circumstances of *Gough*'s case and dismissed the appellant's appeal.

[36] I have dealt with the *Gough*'s case at some length in order to understand the context in which the test, that is, the real danger of bias test came to be pronounced and reaffirmed. Furthermore, the Malaysian Federal Court cases have also relied on the *Gough* principle on the issue of bias. This can be seen the Federal Court cases of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dan tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65, *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701, and the latest being the Federal Court case of *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577, (FC) where the Court of Appeal had reversed the real danger of bias test which was applied by the High Court judge and formulated a new test for recusal cases in the following words:

Would a right thinking member of the public armed with the facts before us come to the conclusion that the appellant would received justice at the end of the trial before the same judge?

[37] The Federal Court had castigated the Court of Appeal for not following the real danger of bias test for recusal and therefore, had clearly violated the doctrine of stare decisis.

[38] Despite adhering to different tests, the result was still the same. Based on the facts and findings against the respondent, the Court of Appeal and the

Federal Court took the view the learned High Court judge should have recused herself.

DECISION OF THIS COURT

[39] At the outset, it would appear that the accused in this case had no complaint up to the stage when his defence was called by Puan Norina at the close of the prosecution case.

[40] His complaint arose when Puan Norina heard the defence, she was at that time 'connected' to the prosecution as she had assumed the functions of DPP with BPR School of Law. Now let us examine the relevant facts, its effect and circumstances relating to this recusal application. They are:

(1) the case against the accused was instituted and prosecuted by the BPR. It was BPR's case;

(2) the defence counsel wrote the letter to the chief registrar to request for Puan Norina to continue hearing the defence case;

(3) on hearing the accused evidence during the defence case, Puan Norina was with the BPR School of Law as its DPP;

(4) Puan Norina has since left the BPR School of Law at Putrajaya to assume the functions as state DPP in Penang;

(5) She was with the BPR School of Law for about two months and 16 days. This can only means that at the time she is to consider the defence and prosecution submissions at the end of the trial and delivering her decision thereto (of course if she is allowed to continue hearing the case), she is no longer with the BPR School of Law;

(6) there was no evidence that Puan Norina had access to the investigation papers involving the accused case;

(7) before the start of the defence case, on her own volition, Puan Norina openly declared her position as BPR DPP. Puan Norina specifically reminded that her position with the BPR School of Law should not be the subject of complaint or appeal. To this, both the defence and prosecution had unequivocally informed Puan Norina that they had no objection for her to continue hearing the case;

(8) there was no complaint by the accused as to the conduct of proceedings during the defence case; and

(9) the defence and prosecution recognised that the accused case was long outstanding and needed to complete it promptly. More so, the accused was a government servant.

[41] In this case, the decision whether to convict or acquit the accused at the end of the trial is yet to be made by Puan Norina. The decision is still pending. But that, I am not unmindful the element of bias against the accused may had surreptitiously creeped in when she took down the evidence from the accused. Puan Norina may well assert that she has acted with integrity and honesty. But her mind may unintentionally be influenced by bias. In the words of Lord Goff at p 659 of *Gough*'s case as follows:

> But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias — a point stressed by Devlin J in *Reg v Barnsley Licensing Justices Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, at p 187.

[42] In *Dato' Tan Heng Chew*'s case, Abdul Hamid Mohamad FCJ said at p 301 (MLJ); p 589 (CLJ):

> The learned High Court judge said she would not be biased. It may be so. But, viewed objectively, the question is whether, in the circumstances of the case, there is a real danger of bias on her part, even though unintentionally. In this respect, I think that the Court of Appeal and this court are in a better position to assess since the Court of Appeal and this court are not directly involved in it. So, if on the facts and in circumstances of the case, this court finds that there is a real danger of bias, even though the trial judge feels that she is not inclined to, I think that in the interest of justice, she should be advised to recuse herself.

[43] One of the facts and circumstances that specifically need to be mentioned here was the counsel's written request for Puan Norina to continue hearing the case. And also the omission or absence of objection on the counsel's part when, before commencement of the defence case, Puan Norina openly declared her position or relationship with the BPR. When I interjected and asked the counsel why he had now changed his stand, he replied that after re-assessment of the case he felt it would be improper for Puan Norina to continue hearing the defence case. His shortcomings should not be imputed to his client (ie, accused). He apologised. Counsel cited the Supreme Court case of *Kiew Foo Mui & Ors v Public Prosecutor* [1995] 3 MLJ 505 where Edgar Joseph FCJ observed at p 511 in the following words:

> In our view, the learned judge remained under such a duty since it is not just of some importance, but of fundamental importance to the administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset — namely a fair trial, notwithstanding the shortcomings of his counsel. It is axiomatic that the primary duty of a judge at any trial — whether criminal or civil — is to ensure that justice is done, no doubt, according to law.

[44] The above passage is directed to the trial judge whose duty is to automatically remind the prosecution and defence of their respective right to cross-examine all over again the prosecution witnesses, who already testified on the voire dire in the absence of the assessors. Counsel's shortcomings in *Kiew Foo Mui*'s case may be distinguished with the accused counsel shortcomings in this case, if any. There counsel failed or omitted to act on their own to apply to the trial judge (quite apart the trial judge duty to remind the prosecution and defence) to have the witnesses who had given evidence in the voire dire to be cross-examined before the assessors in the main trial. While in the instant case, the accused counsel had taken positive steps to express in clear terms, both written and oral, that he wished the presiding magistrate to continue to hear the accused case but subsequently, he retreated and changed his stand — the magistrate ought to recuse herself. At such the authority of *Kiew Foo Mui* do not seem to support the accused counsel contention.

[45] Finally having regard to the facts, its effect and circumstances enumerated and discussed above, the question arose was this: by reason of Puan Norina's 'connection' with the BPR at the material time, whether there was such a possibility of bias on her part against the accused that she should be advised to recuse herself. Viewed objectively and having applied the real danger of bias test (I have choosen not to use the real likelihood of bias test as convassed by the counsel) to the facts and circumstances of this case, this court felt that there was no possibility of such bias.

[46] In exercising my revisionary power, I would affirm the magistrate's decision not to disqualify herself. I, therefore, dismiss this recusal application. I also make an order that the defence and the prosecution are to file their respective written submissions at the close of the defence case as soon as possible as directed by Puan Norina and Puan Norina is to deliver her decision on the next date fixed for continuation.

POSTSCRIPT

[47] Dissatisfied with my above decision, the petitioner had, on 5 February 2008, filed a notice of motion (encl 2a) at the Court of Appeal vide Mahkamah Rayuan Permohonan Jenayah No 07–2 Tahun 2008 and it was heard on 20 February 2008 and reserved for decision on 22 February 2008. The petitioner's notice of motion (encl 2A) was dismissed. The corum: (1) YA Dato' James Foong Cheng Yuen JCA; (2) YA Dato' Nihrumala Segara a/l MK Pillay JCA and (3) YA Datuk Wira Abu Samah bin Nordin JCA.

[48] The notice of motion (encl 2a) was further taken up by the petitioner to the Federal Court vide Mahkamah Persekutuan, Permohonan Jenayah

No 07–1 Tahun 2008 and having heard the petitioner's motion, it was, on 21 April 2008, unanimously dismissed. The corum: (1) YAA Datuk Seri Abdul Hamid Mohamad Chief Justice; (2) YAA Datuk Alauddin Mohd Sheriff CJ (Malaya); and (3) YA Datuk Zulkefli Ahmad Makinudin FCJ.

Application dismissed.

Reported by Augustine Soosay